No. 80498-2

FAIRHURST, J. (concurring) — I agree with the lead opinion that the State was not required to prove that David Tyler Fair committed a recent overt act[1] in order to civilly commit him as a sexually violent predator (SVP). I write separately to offer different statutory and constitutional analyses.

While the lead opinion reaches the correct result in holding the State is not statutorily required to allege and prove a recent overt act when the respondent is incarcerated, its analysis is conclusory and does not provide an explanation for its holding. The dissent lays out its position that former RCW 71.09.030(5) (2008), *recodified as* RCW 71.09.030(1)(e), requires the State to prove a recent overt act but ignores the other statutory language and our case law. I would hold the State was not required to prove Fair committed a recent overt act because the plain language of chapter 71.09 RCW is clear. Former RCW 71.09.030 provides that a prosecutor can file an SVP petition when it appears:

> (1) A person who at any time previously has been convicted of a sexually violent offense is about to be released from total confinement .

[1]"'Recent overt act'" is defined as "any act or threat that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act." Former RCW 71.09.020(10) (2006), *recodified as* RCW 71.09.020(12).

> . . or (5) a person who at any time previously has been convicted of a sexually violent offense and has since been released from total confinement and has committed a recent overt act.

RCW 71.09.060(1) provides that the court or jury shall determine whether the person is an SVP and imposes the additional requirement: "If, on the date that the petition is filed, the person was living in the community after release from custody, the state must also prove beyond a reasonable doubt that the person had committed a recent overt act." "'Total confinement'" has been defined by RCW 9.94A.030(47) as "confinement inside the physical boundaries of a facility or institution operated or utilized under contract by the state or any other unit of government for twenty-four hours a day, or pursuant to RCW 72.64.050 and 72.64.060." *In re Det. of Albrecht*, 147 Wn.2d 1, 9-10, 51 P.3d 73 (2002). In *Albrecht*, we held the plain meaning of former RCW 71.09.030 did not require the State to prove a recent overt act when it filed the SVP petition after Albrecht had been released on community supervision, but was serving a 120-day jail sentence for violating a term of the supervision. 147 Wn.2d at 4-6, 9-10.

Given the plain meaning of former RCW 71.09.030 and RCW 71.09.060 and our holding in *Albrecht*, the statute is clear that the State is required to prove a recent overt act if it files the SVP petition when the respondent is not in total

confinement. As Fair was in prison and, thus, totally confined, when the State filed its petition, the State was not statutorily required to allege and prove beyond a reasonable doubt that Fair committed a recent overt act.

Because the statute does not require the State to prove a recent over act, I turn to analyze whether the constitutional right to due process does. Unlike the lead opinion and dissent, I would hold that, when the State files a petition seeking to commit an incarcerated individual as an SVP, due process requires the State to prove a recent overt act if it can be proved that the alleged SVP's diagnosis and pattern of behavior indicate the individual had an adequate opportunity, while incarcerated, to commit a recent overt act against the type of victim the individual was predisposed to victimize. Because Fair's diagnosis and pattern of behavior is focused toward young children, particularly minor girls, and because Fair's several years of incarceration prevented him from having the opportunity to again victimize that segment of society, I agree with the lead opinion that the State was not required to prove Fair committed a recent overt act.

To understand why due process requires such a holding, it is necessary to examine the rationale for the recent overt act requirement. In *In re Personal Restraint of Young*, 122 Wn.2d 1, 39-43, 857 P.2d 989 (1993), we first recognized

the due process requirement that the State is required to prove an alleged SVP committed a recent overt act. We found the requirement after conducting a strict scrutiny analysis of the SVP statutory scheme and determining that a recent overt act requirement ensures that the statute is narrowly tailored to achieve the compelling state interest of protecting society from sex predators. *Id.* at 26-27, 39-43. We determined that the recent overt act requirement ensured satisfaction of due process concerns, mostly that the mental illness be real and current enough to justify the deprivation of liberty. *Id.* at 40-41 (citing *In re Harris*, 98 Wn.2d 276, 654 P.2d 109 (1982) (establishing the recent overt act requirement for regular civil commitments)). In *Young*, we limited the requirement to individuals who were not incarcerated when the SVP petition was filed. *Id.* at 41. We provided a blanket statement that "[f]or incarcerated individuals, a requirement of a recent overt act under the Statute would create a standard which would be impossible to meet." *Id.*

When we first recognized the recent overt act requirement in *Young*, we relied extensively on *People v. Martin*, 107 Cal. App. 3d 714, 165 Cal. Rptr. 773 (1980). In *Martin*, the California Court of Appeal rejected an argument that due process required the State always to prove a recent overt act, even when the respondent is incarcerated. *Id.* at 725. The court reasoned it would be absurd to

impose such a requirement when there was little or no opportunity for the person to commit a recent overt act and thus demonstrate his or her dangerousness. The court wrote:

> As in the present case, a [mentally disordered sex offender] may have a predisposition to commit a specific type of sexual offense—one that cannot, as a practical matter, be committed during confinement. Here, appellant's predisposing disorders have repeatedly driven him to force sexual relations upon preadolescent girls (the last one was four years old). Atascadero [State Hospital] necessarily provides small opportunity for appellant to act out his current drives with such girls. Must appellant therefore be released notwithstanding the existence of other strong evidence of his continuing disorder and dangerous disposition? Our answer is "no."

Id. (footnote omitted). Our holding in *Young* appears to agree with that reasoning, particularly when we noted that confinement prevents overt acts from occurring. 122 Wn.2d at 41.

Nonetheless, in the cases subsequent to *Young*, we have largely glossed over the underlying rationale and focused on the statement that due process does not force the State to prove an impossibility. As evidenced by the cases and arguments provided by the majority and the dissent, the result appears to be that this court has provided seemingly contradictory holdings regarding whether the State is required to prove a recent overt act when it filed the SVP petition while the respondent was

incarcerated. *Compare Albrecht*, 147 Wn.2d 1, *with In re Det. of Henrickson*, 140 Wn.2d 686, 2 P.3d 473 (2000).

Because of these cases, it is next necessary to understand when it is "impossible" or "absurd" to require the State to prove a recent overt act. Practicalities make a person's potentiality to commit a dangerous act an impossibility. It is this instance--the State's act of incarcerating an individual--where we stated it would be absurd to require the State to prove a recent overt act. *See Young*, 122 Wn.2d at 41-42; *Henrickson*, 140 Wn.2d at 695-96; lead opinion at 14-15. The absurdity, however, does not exist from the fact that the facts render the burden impossible for the State to meet. If that were so, then the State would be allowed to convict someone for committing three out of four elements of a crime because the fourth was impossible to prove. Rather, the absurdity comes from the fact that incarceration can preclude the alleged SVP from having the opportunity to commit recent overt acts against the type of victim the alleged SVP is predisposed to victimize. In these situations, as the *Martin* court noted, although there could be no proof of a recent overt act, the facts could still demonstrate the person has a mental illness and is sufficiently dangerous to justify the curtailment of that person's liberty. 107 Cal. App. 3d at 725. However, if it could be shown that the alleged

SVP had adequate opportunity while being incarcerated to commit a recent overt act but did not, then the civil commitment would not be narrowly tailored to protect his or her liberty interest.[2] Because that person's due process rights would be violated, we should require proof of a recent overt act if the alleged SVP had an opportunity to commit a recent overt act.[3]

Applying that standard to this case, Fair has been diagnosed with pedophilia, urophilia, and paraphilia. He has a behavioral pattern of committing acts against young children, particularly minor girls. In June 2004, at the time the State filed its SVP petition, Fair had been incarcerated since November 1989, in part because of a sentence for a sexually violent crime.[4] During that time, Fair did not have access to

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[2]The dissent contends this burden of proof is illusory because we held in *Young* that the State does not need to prove a recent overt act if an alleged SVP was incarcerated when the petition was filed. I contend that *Young* was imprecise in its holding. Implicit to *Young*'s and the dissent's reasoning is that there is no opportunity for someone to commit a recent overt act while being incarcerated. The premise to this reasoning is that prisons will segregate prisoners according to their convictions so as to prevent an opportunity to harm other inmates. I dispute such a premise. While prisons and jails are no doubt controlled environments and prisoners can be segregated based upon their crimes and acts done in prison, a male prisoner serving time for raping a male victim can still be placed in the general population of the prison where there is opportunity to harm other prisoners. Due process prevents the State from committing the prisoner as an SVP if he did not act on that opportunity. Both the lead opinion and the dissent fail to account for this situation in their reasoning. While my reasoning likely affects a small segment of potential SVPs, it better comports with the due process requirement that the State must prove a person is currently dangerous before committing him or her.

[3]I must note that using opportunity to distinguish when the State must prove a recent overt act applies only when the alleged SVP is incarcerated. When an alleged SVP is not incarcerated, we can safely assume that there are not the same physical barriers preventing the opportunity of the alleged SVP to commit a recent overt act.

young children, the segment of society he is predisposed to victimize. As a result, it would be absurd to require the State to prove a recent overt act because it is entirely possible that Fair has a mental illness that renders him a danger to society, particularly young children. Due process does not require the State to prove Fair committed a recent overt act against a young child given incarceration has prevented Fair from having access to young children since November 1989.[5] Because Fair's lengthy incarceration prevented him from having the opportunity to commit a recent overt act against a young child, I concur with the majority that the State was not statutorily or constitutionally required to prove a recent overt act.

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[4]Like the lead opinion, I agree that because the State filed its SVP petition while Fair was incarcerated in part for his sentence for child molestation, the State was not otherwise obligated to prove a recent overt act.

[5]The dissent posits that, although the last time Fair was not in confinement was some 15 years before the State filed its SVP petition, the State was nonetheless required to prove Fair committed a recent overt act during the time he was not in custody in 1989. As the dissent admits, such a requirement would eliminate the State's burden to prove the overt act was recent. The problem with the dissent's argument is that, if Fair had committed an overt act 15 to 20 years ago, that act would not demonstrate Fair is currently dangerous.

The result is that both the lead opinion and the dissent would read elements out of the SVP scheme. The lead opinion would read out the recent overt act requirement if a person is incarcerated, even if there was ample opportunity to commit a recent overt act. The dissent would read out the requirement that the overt act be recent. Following my methodology retains all the elements and better comports with the constitutional requirement that the State can commit someone only if he or she is presently dangerous.

AUTHOR:
Justice Mary E. Fairhurst

WE CONCUR:

Justice Charles W. Johnson